STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2001
V	No. 215417 Oakland Circuit Court
GALE MICHAEL TANNER, Defendant-Appellant.	LC No. 90-101354-FH

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver between 225 grams and 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty to thirty years' imprisonment for the drug conviction, and to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

This case is before this Court for the second time. In *People v Tanner*, 222 Mich App 626; 564 NW2d 197 (1997), a panel of this Court reversed defendant's convictions, holding that the trial court erred in admitting into evidence the affidavit supporting the search warrant, and in denying defendant's motion for an evidentiary hearing to determine whether there was a violation of the knock and announce statute, MCL 780.656. Defendant raises numerous issues in the instant appeal from his jury trial convictions on remand, none of which require reversal.

Since approximately January 1990, the Waterford Police Department's special operations unit had been investigating defendant. In March 1990, the police executed a search warrant at defendant's home where, after entry into the attached garage where defendant was located, police observed a small plastic bag of cocaine on a chair and found a loaded nine-millimeter Uzi in a tool drawer. Thereafter, police entered the home and, on searching defendant's bedroom, found two long guns in a closet and a six to seven foot tall locked safe.

Upon opening the safe, police found two plastic bags containing 478.14 grams of cocaine. The safe also contained three notebooks that appeared to contain records regarding drug deals, $14,100 in cash, an electronic scale, a dish or pan for the scale, small plastic bags, and assorted guns and ammunition, including a loaded .357 Smith and Wesson revolver and a nine-millimeter

Uzi. Police also found marijuana and a .45 caliber machine gun in another bedroom, and a shotgun lying on a couch in the basement. In total, approximately twenty-seven firearms were found throughout defendant's residence during the search. Defendant was arrested and subsequently released on bond. After failing to appear for his trial, a bench warrant was issued for his arrest. Two years later, defendant was arrested in Arizona where he had been living under an alias name. After his first jury trial and following this Court's remand, the trial court conducted an evidentiary hearing and found that police did not violate the knock and announce statute. The second jury trial resulted in convictions.

On appeal, defendant first argues that the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant because defendant produced testimony establishing that police officers failed to announce their presence and purpose, in violation of MCL 780.656, before entering and executing the search warrant. We disagree. We review a trial court's factual findings regarding a motion to suppress for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). The trial court's ultimate decision regarding a motion to suppress is reviewed de novo. *Id*.

After reviewing the record, we cannot conclude that the trial court clearly erred in denying defendant's motion. Defendant presented testimony from individuals present in the garage and house at the time of the execution of the search warrant who testified that the officers did not announce their presence and purpose before executing the warrant. The prosecution presented testimony from police officers involved in the execution of the search warrant who testified that they did announce their presence and purpose prior to their entry. The trial court specifically found that the testimony of defendant's witnesses was not credible based on notable inconsistencies in their testimony. Where the resolution of the disputed issue turned on the credibility of the witnesses, we defer to the trial court's determination as having the superior ability to evaluate the credibility of the witnesses. See *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). Further, the court's decision is not rendered clearly erroneous by the proffered lie detector evidence.

Next, defendant argues that the trial court erred in denying his request for an evidentiary hearing to determine whether information contained in the search warrant affidavit was either deliberately false or made in reckless disregard of the truth. We disagree.

Search warrant affidavits are presumptively valid. *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978). A defendant who requests an evidentiary hearing challenging the veracity of the search warrant affidavit must make a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false information into the affidavit and that the false material was necessary to a finding of probable cause. *Id*. at 155-156. An evidentiary hearing is not required if the affidavit is sufficient to support a finding of probable cause without the allegedly untrue information. *Id*. at 171; *People v Sawyer*, 215 Mich App 183, 194; 545 NW2d 6 (1996).

In this case, even if the allegedly false information is excluded from the search warrant affidavit, the affidavit was sufficient to establish probable cause and, thus, to support the search warrant. The affidavit provided detailed information regarding the presence of cocaine and

indicia of the regular sale of drugs at defendant's residence that was provided to the affiant officer by a confidential informant. The affidavit provided sufficient facts illustrating the informant's personal knowledge of the information supplied. It also established that the informant was credible or that the information was reliable in that the informant: voluntarily provided the information against his penal interest; was not being charged for a crime; had purchased cocaine from defendant on several occasions; had been to defendant's house the day before the search warrant was issued and observed large quantities of cocaine, scales, and packaging materials; and had a history of providing accurate information regarding other narcotic traffickers. See MCL 780.653; *Echavarria*, *supra* at 366-367; *People v Poole*, 218 Mich App 702, 706-707; 555 NW2d 485 (1996). Further, the affiant officer conducted surveillance of defendant's house the day the search warrant was issued and observed visitor traffic consistent with drug dealing. See *People v Perry*, 620 NW2d 308 (2000); *People v Hall*, 158 Mich App 194, 198; 404 NW2d 219 (1987). Accordingly, the affidavit contained sufficient information, without the allegedly false information, to support the issuance of the search warrant and the trial court did not err in denying defendant's request for an evidentiary hearing.

Next, defendant argues that the evidence was insufficient to establish that he possessed and intended to deliver between 225 and 650 grams of a mixture containing cocaine. We disagree. In reviewing a sufficiency claim, this Court considers the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The essential elements of the charged crime are that (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing between 225 and 650 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995).

First, defendant argues that there was insufficient evidence to establish that the cocaine was in a mixture weighing between 225 and 650 grams, negating both the possession and weight elements. However, the Oakland County Sheriff's Department Crime Lab Detection Laboratory Report, that was admitted into evidence without objection, indicated that the substance found in both bags confiscated from defendant's safe contained cocaine and had a combined weight of 478.14 grams. Accordingly, defendant's argument is without merit.

Second, defendant claims that there was insufficient evidence that he intended to deliver the cocaine. Intent to deliver narcotics may be "inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe*, *supra* at 524. Here, 478.14 grams of a mixture containing cocaine was found in a locked safe in defendant's master bedroom. Other items in the safe included notebooks appearing to contain information regarding drug sales, small plastic bags, $14,100 in cash, and an electronic scale. None of the evidence suggested that the cocaine was possessed for personal use. Further, defendant's wife testified that she did not have the combination to the safe and had never used the safe. This evidence, when viewed in a light most

favorable to the prosecution, was sufficient for the jury to conclude beyond a reasonable doubt that defendant possessed and intended to deliver between 225 and 650 grams of a mixture containing cocaine.

Next, defendant argues that he was denied a fair trial because the prosecutor failed to identify or produce the confidential police informant, an allegedly res gestae witness, at trial. However, at trial and during the questioning of the police officer who worked with the informant, defense counsel indicated that he was not going to ask the identity of the informant and did not want to know the identity. Defendant cannot assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant next argues that the trial court erred in denying his motion for directed verdict because the evidence was insufficient to sustain a conviction for felony-firearm. Defendant argues that at the time of his arrest he was in his garage and the only gun in the garage was in a tool drawer and was inaccessible; therefore, he was not in possession of a firearm during the commission of the underlying felony. We disagree. In reviewing a trial court's decision on a motion for directed verdict, this Court considers the evidence presented by the prosecutor up to the time the motion was made, in a light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

To sustain a conviction for this offense, the prosecutor must prove that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Contrary to defendant's contention, the relevant inquiry is not whether defendant possessed a firearm at the time of his arrest, but rather whether he did so at the time he committed the underlying felony. *Id*. at 439. In this case, numerous firearms were found throughout defendant's residence, including in the locked safe where the cocaine, scale, and packaging materials were found during the execution of the search warrant. Considering the evidence in a light most favorable to the prosecution, the jury could reasonably conclude that defendant possessed a firearm while he possessed the cocaine with the intent to deliver it.

Next, defendant argues that he was denied a fair trial when the prosecutor made an improper remark regarding the credibility of one of the witnesses. We disagree. When reviewing allegations of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant's allegation arises from a conversation between the prosecutor and the lead investigating officer. Following the testimony of one of the prosecution's witnesses, while seated at counsel's table, the prosecutor allegedly told the officer that the witness was a liar. The alleged comment was overheard by a juror who advised the court that he could hear the prosecutor's comments. The court indicated that it did not notice the prosecutor speaking loudly, but cautioned the prosecutor. Subsequently, a lengthy instruction was given to the jury to disregard any comments inadvertently overheard and instructed the jury not to discuss any such

comments or conversations. The court also instructed the jury that statements and arguments by the attorneys are not evidence and that they are only to consider the evidence. Considering the context in which this issue arose and the trial court's curative instructions, reversal is not warranted.

Defendant also argues that he was denied a fair trial because the trial court failed to instruct the jury on the cognate lesser included offense of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). See *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989). We disagree. Before a trial court instructs on a cognate lesser included offense, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). In this case, the evidence clearly established that the amount of cocaine found in defendant's locked safe weighed 478.14 grams; therefore, the evidence did not support a conviction for possession with intent to deliver less than 50 grams of cocaine. Accordingly, the trial court properly denied defendant's request for such instruction.

Next, defendant argues that the trial court abused its discretion in failing to find substantial and compelling reasons to impose a sentence below the statutorily mandated twenty-year minimum sentence provided in MCL 333.7401(2)(a)(ii). See MCL 333.7401(4). We disagree.

The sentencing court's determination whether substantial and compelling reasons exist to justify departure from a statutorily mandated minimum sentence is reviewed for an abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995); *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000). Our review of the record fails to disclose mitigating circumstances surrounding the offense, nor other objective and verifiable prearrest or postarrest factors that warrant departure from the minimum sentence. See *Fields*, *supra* at 76-77. At the time of his initial arrest, defendant was found to have several firearms, a substantial amount of cash, packaging materials, and a large amount of cocaine at his residence. Defendant had not been employed for approximately two years at the time of this arrest. Further, while on bond after his initial arrest, defendant fled the state and lived under an alias name for two years until he was apprehended by police. Substantial and compelling reasons justifying departure from mandatory statutory sentences exist only in exceptional cases; this is not such a case. See *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). Therefore, the trial court did not abuse its discretion in imposing sentence.

Defendant also argues that he was denied due process and equal protection as a consequence of Michigan's parole scheme. Specifically, defendant argues that his sentence is cruel or unusual because persons sentenced to life imprisonment following conviction for possession with intent to deliver over 650 grams of cocaine are eligible for parole consideration before persons sentenced to an indeterminate term of years, which mandates a mandatory minimum sentence of 20 years' imprisonment. See MCL 791.234(6); MCL 333.7401(2)(a)(i) and (ii). Defendant challenges the constitutionality of the parole scheme for the first time on appeal but has failed to cite apposite authority in support of his argument and has failed to adequately argue the merits of his position in his brief. Consequently, we decline to address this unpreserved and improperly presented issue. See *People v Kelly*, 231 Mich App 627, 640-641;

588 NW2d 480 (1998); *People v Hubbard (After Remand)*, 217 Mich App 459, 483; 552 NW2d 493 (1996). Further, defendant's sentence was within the prescribed limits of MCL 333.7401(2)(a)(ii) and, thus, was presumptively proportionate and valid. See *People v DiVietri*, 206 Mich App 61, 63; 520 NW2d 643 (1994).

Finally, defendant argues that the mandatory minimum sentence of twenty years required by MCL 333.7401(2)(a)(ii) constitutes cruel or unusual punishment. This Court has held that the mandatory twenty-year minimum sentence required by MCL 333.7401(2)(a)(ii) does not constitute cruel or unusual punishment. See *People v Williams*, 189 Mich App 400, 404-405; 473 NW2d 727 (1991); *Marji*, *supra* at 542-543. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot